Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-750

JAMES P. D'ANGELO, Receiver for PAPANTLA ROYALTIES CORPORATION, a Dissolved Delaware Corporation,
Petitioner,

v.

PETROLEOS MEXICANOS, a Decentralized Institution Pertaining to the Republic of Mexico,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation, *Petitioner*,

v.

PETROLEOS MEXICANOS, a decentralized institution pertaining to the Republic of Mexico, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner respectfully requests that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-encaptioned cause.

OPINION BELOW.

The decision of the Court of Appeals for the Third Circuit is not yet reported. It is set out as Appendix A hereto at Page A1. The opinions of the United States District Court for the District of Delaware are reported at 398 F. Supp. 72 (1975); 422 F. Supp. 1280 (1976). They are set out as Appendix B hereto at Pages A3 and A33.

JURISDICTION.

The opinion of the United States Court of Appeals was filed on September 14, 1977. This Court's jurisdiction is invoked pursuant to 28 U. S. C. Sec. 1254.

QUESTIONS PRESENTED.

1. Whether the Warren-Payne understanding, which was formally negotiated, attested and approved by the respective Executive branches of the Mexican and United States governments, is a recognizable and enforceable international agreement, where the said agreement was undertaken as a condition to the United States government granting recognition to the then existing government of Mexico?

2. Whether the Act of State doctrine may be interposed as a defense, where the acts of the foreign government sought to be judicially reviewed were subject to and controlled by a clear and unambiguous understanding which was formally negotiated, attested and approved by the respective Executive branches of the Mexican and United States governments, and where the said understanding, which related solely to the commercial interests of the respective parties, was undertaken as a condition to the United States government granting recognition to the then existing government of Mexico?

3. Whether the decision of this Court in *U. S. v. Pink*, 315 U. S. 203 (1942), requires a lower court to accept as conclusive, a foreign judicial officer's interpretation of the scope and effect of an applicable foreign law or act, where the said judicial officer's interpretation was not secured by having the United States government request, through proper diplomatic channels, an official interpretation of the intended effect of the foreign law or act.

4. Whether the lower court acted improperly by reversing its previously rendered decision denying the Respondent's motion for summary judgment, where the only basis for the reversal was a controverted affidavit which the respondent secured upon the direct advice of the lower court, and where there still existed material issues of fact.

TREATIES AND AGREEMENTS.

Proceedings of the United States-Mexican Commission Convened in Mexico City May 14, 1923 (Pages 47-50)

I.—It is the duty of the Federal Executive Power, under the Constitution, to respect and enforce the decisions of the Judicial Power. In accordance with such a duty, the Executive has respected and enforced, and will continue to do so, the principles of the decision of the Supreme Court of Justice in the "Texas Oil Company" case and the four other similar "amparo" cases, declaring that Paragraph IV of Article 27 of the Constitution of 1917 is not retroactive in respect to all persons who have performed, prior to the promulgation of said Constitution, some positive act which would manifest the intention of the owner of the surface or of the persons entitled to exercise his rights to the oil under the surface: such as drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil and in cases where from the contract relative to the subsoil it appears that grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described. According to these decisions of the Supreme Court, the same rights enjoyed by those owners of the surface who have performed a positive act or manifested an intention such as has been mentioned above, will be enjoyed also by their legal as-

signees or those persons entitled to the rights to the oil. The protection of the Supreme Court extends to all the land or subsoil concerning which any of the above intentions have been manifested, or upon which any of the above specified acts have been performed, except in cases where the documents relating to the ownership of the surface or the use of the surface or the oil in the subsoil establish some limitation.

The above statement has constituted and will constitute in the future the policy of the Mexican Government, in respect to lands and the subsoil upon which or in relation to which any of the above specified acts have been performed, or in relation to which any of the above specified intentions have been manifested; and the Mexican Government will grant to the owners, assignees or other persons entitled to the rights to the oil, drilling permits on such lands, subject only to police regulations, sanitary regulations and measures for public order and the right of the Mexican Government to levy general taxes.

II.—The Government, from the time that these decisions of the Supreme Court were rendered, has recognized and will continue to recognize the same rights for all those owners or lessees of land or subsoil or other persons entitled to the rights to the oil who are in a similar situation as those who obtained "amparo;" that is, those owners or lessees of land or subsoil or other persons entitled to the rights to the oil who have performed any positive act of the character already described or manifested any intention such as the above specified.

III.—The Mexican Government, by virtue of the decisions of the President (acuerdos) dated January 17, 1920, and January 8, 1921, respectively, has granted and grants preferential rights to all owners of the surface or persons entitled to exercise their preferential rights to the oil in the

subsoil, who have not performed a positive act such as already mentioned, showing their intention to use the subsoil, or manifested an intention as above specified, so that whenever those owners of the surface or persons entitled to exercise their preferential rights to the oil in the subsoil wish to use or obtain the oil in the said subsoil, the Mexican Government will permit them to do so to the exclusion of any third party who has no title to the land or to the subsoil.

IV.—The present Executive, in pursuance of the policy that has been followed up to the present time, as above stated, and within the limitations of his constitutional powers, considers it just to grant, and will continue in the future to grant, as in the past, to owners of the surface or persons entitled to exercise their preferential rights to the oil, who have not performed prior to the Constitution of 1917 any positive act such as mentioned above, or manifested an intention as above specified, a preferential right to the oil and permits to obtain the oil to the exclusion of any third party who has no title to the land or subsoil, in accordance with the terms of the legislation now in force as modified by the decisions of January 17, 1920 and January 8, 1921, already mentioned. The above statement in this paragraph of the policy of the present Executive is not intended to constitute an obligation for an unlimited time on the part of the Mexican Government to grant preferential rights to such owners of the surface or persons entitled to exercise their rights to the oil in the subsoil.

V.—The American Commissioners have stated in behalf of their Government that the Government of the United States now reserves, and reserves, should diplomatic relations between the two countries be resumed, all the rights of the citizens of the United States in respect to the subsoil under the surface of lands in Mexico owned by

citizens of the United States, or in which they have an interest in whatever form owned or held, under the laws and Constitution of Mexico in force prior to the promulgation of the new Constitution, May 1, 1917, and under the principles of international law and equity. The Mexican Commissioners, while sustaining the principles hereinbefore set forth in this statement but reserving the rights of the Mexican Government under its laws as to lands in connection with which no positive act of the character specified in this statement has been performed or in relation to which no intention of the character specified in this statement has been manifested, and its rights with reference thereto under the principles of international law, state in behalf of their Government that they recognize the right of the United States Government to make any reservation of or in behalf of the rights of its citizens.

The Bucareli Agreements and International Law, Antoni Gomez Robledo, translated by Dr. Salomon de la Selva; The National University of Mexico Press, Mexico, D. F., 1940, p. 83-86. Library of Congress, JX 238 M6 B82.

STATEMENT.

The petitioner, James P. D'Angelo, is the receiver of Papantla Royalties Corporation ("Papantla"), a dissolved Delaware corporation. The respondent, Petroleos Mexicanos ("PEMEX"), is a decentralized governmental agency of Mexico. The petitioner brought this action for an order requiring the respondent to account for oil which it produced from wells which were formerly operated by certain oil companies whose real and personal properties were expropriated on March 18, 1938.[1] The petitioner claims that Papantla has royalty and participation interests in those wells and that those interests were not affected by the expropriation decree of 1938. In granting the respondent's motion for summary judgment, the District Court, which had accepted jurisdiction over the matter pursuant to 28 U. S. C. Sec. 1332(a)(2), held that the case involved sovereign acts of the Mexican government which, under the act of state doctrine, were not subject to review or challenge in a United States Court.

The title of Papantla to the royalties and participation rights upon which the petitioner bases his claim is derived from 576 confirmatory concessions which were acquired by Papantla pursuant to the law of Mexico. Papantla acquired the 576 confirmatory concessions, which authorized the exploitation of oil in given parcels of land, by filing with the head of the legal department of the Department of Economy of Mexico (1) proof of the title of certain landowners claiming the subsoil rights and (2) proof of their intention, prior to 1917, to use the oil in the subsoil.

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1. It should be noted that Papantla has carefully preserved its rights and filed all the necessary documentation to avoid the running of the statute of limitations. See Judge Steel's first opinion, D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72 (Del., 1975), at A13.

Papantla made arrangements with certain large oil companies to provide for the development and exploitation of the 576 confirmatory concessions. Under the terms of the agreements reached by the parties, Papantla was to receive an interest in all of the oil which was produced from the properties in which Papantla held an interest.

Papantla's initial interests in the 576 confirmatory concessions and its participation and royalty interests which arose thereunder, were recognized and afforded protection by the Warren-Payne agreement.

The Warren-Payne agreement was an agreement reached between the governments of Mexico and the United States, which expressly provided that confirmatory concessions held by American nationals would not be confiscated by the Mexican government. The agreement, which was formally negotiated, attested and approved by the respective executive branches of the United States and Mexican governments, was undertaken as a condition to the United States government granting recognition to the then existing government of Mexico.

The historical significance and intended scope and effect which this country's executive branch afforded to the Warren-Payne agreement was set forth in a speech delivered by President Calvin Coolidge on April 25, 1927.[2]

> "In 1917 a new constitution was adopted with provisions affecting agricultural, mining, and oil lands, which we thought threatened the holdings of our nationals with confiscation. Their constitution is not self-enforcing, but requires the promulgation of laws to put it into effect. While this was in process of being brought about a government was established

2. The recorded copy of the speech may be found in Vol. III, Foreign Relations of the United States, 1927, Department of State, Washington, D. C., Library of Congress, M. R. R. A. L. C., JX 233 A3, Pages 209-220.

> which we did not recognize. In 1920 General Obregon was chosen President and sought recognition. In negotiations for that purpose it was repeatedly pointed out that we feared that the new constitution, although one of its provisions expressly prohibited the enactment of retroactive laws, might be interpreted as retroactive in its effect upon the holdings of real estate which our people had secured prior to its adoption. We sought assurances from the Mexican Government that such was not the case. In order to prevent misunderstanding we sent two commissioners to Mexico City in 1923 to confer upon this subject, and also on the question of our claims, with two Mexican commissioners. Charles Beecher Warren and John Barton Payne represented our Government. They had a series of conferences and kept written records of their proceedings, in which are set out the recommendation for the appointment of two claims commissions and *the understanding that the constitution of 1917* was not to be given retroactive *or confiscatory application.* These records were duly signed and attested by the commissioners and were submitted to the President of Mexico and the President of the United States for their mutual approval, which was given (Footnote 24: See Proceedings of the United States-Mexican Commission convened in Mexico City, May 14, 1923). It was solely because of our understanding secured in this formal way that our property rights would be respected, that recognition of the government of President Obregon was granted on September 3, 1923." (Italics ours.)

On March 18, 1938, pursuant to a presidential decree, the Mexican government seized and confiscated certain privately owned oil interests. The decree, which ex-

pressly authorized the confiscation of real and personal property belonging to certain oil companies, read as follows:

> "Decree which expropriates in favor of the patrimony of the Nation, personal and real properties belonging to the oil companies who refused to accept the decision of the 18th of December of 1937 of group number 7 of the Federal Board of Conciliation and Arbitration.
>
> "There is expropriated by reason of public utility in favor of the Nation; the machinery, installations, buildings, pipelines, refineries, storage tanks, ways of communication, tank cars, distribution stations, embarcations and all of the other personal property and real property of: Compania Mexicana de Petroleo El Aguila, S.A., Compania Naviera San Ricardo, S.A.; Compania Naviera De San Christobal; Suasteca Petroleum Company; Mexican Sinclair Petroleum Corporation; Stanford y Company Sucessores, Sienc; Penn Mex Fuel Company; Richmond Petroleum Company de Mexico; Compania Petrolera el Agwi, S.A.; Compania de Gas y Combustible Imperio; Consolidated Oil Company of Mexico; Compania Mexicana de Vapores San Antonio, S.A.; Sabalo Transportation Company; Clanta S.A. v. Cacalilao, S.A., in amounts as may be necessary in the opinion of the Secretariat of National Economy for the discovery, production, transportation, storage, refinery and distribution of the petroleum industry."

The petitioner's present cause of action is grounded upon the initial theory that Papantla's interests in the 576 confirmatory concessions are still extant as they were not expropriated, as is obvious from the language of the 1938

decree itself above quoted. The petitioner maintains that the decree related solely to the real and personal property of the 17 oil companies therein specified, and that any contractual rights and participation interests which Papantla had retained in its 576 confirmatory concessions were not affected by the presidential decree.

In determining the effect of the decree, the lower court relied solely upon an affidavit executed by the present Attorney General of Mexico. The lower court held that the affidavit conclusively established that Papantla's interests and rights were confiscated by the decree of March 18, 1938. By granting the respondent's motion for summary judgment, the lower court held that the intended effect of the decree did not present a genuine issue of material fact, although, (1) the interpretation of the Attorney General was contrary to the clear and unambiguous language of the decree; (2) the interpretation of the Attorney General was controverted by affidavits and evidence offered by the petitioner and (3) the interpretation was secured at the request of the respondent and not, by having the United States government request, through proper diplomatic channels, an official interpretation of the intended effect of the foreign state's actions.

The petitioner's cause of action is also based upon an alternative premise; conceding, arguendo, that the decree effectively confiscated Papantla's rights and interests, then the Court could review the propriety of the Mexican government's actions as those actions were contrary to an extant agreement (Warren-Payne) regarding controlling legal principles.

The lower court determined this issue by holding that the Warren-Payne agreement did not constitute an agreement, and that, therefore, the court was prohibited from reviewing the action of the Mexican government by

the Act of State Doctrine.[3] Relying upon the Act of State doctrine, the lower court granted the respondent's motion for summary judgment.

It is from this judgment, which was affirmed by the Third Circuit Court of Appeals, that this petition for certiorari is taken.

3. See Appendix C for letter from State Department regarding the Department's position on the respondent's interposition of the defense of Act of State.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Is in Direct Conflict With Applicable Decisions of This Court Because It Permitted the Respondent to Interpose the Defense of Act of State Although There Was an Extant Agreement (Warren-Payne) Regarding Controlling Legal Principles.

The lower court's decision is in conflict with this Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964). The lower court failed to apply the exception to the applicability of the Act of State Doctrine which this Court recognized and established in *Sabbatino, supra*. This Court's decision in *Sabbatino, supra*, established the principle that a foreign sovereign may interpose the defense of Act of State only in the absence of a treaty or other unambiguous agreement regarding controlling legal principles.

> "* * * that the Judicial Branch will not examine the validity of a taking of property within its own territory by a Foreign Sovereign Government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U. S. at 428

In the instant case, the lower court permitted the defendant to interpose the defense of Act of State although there was extant an unambiguous agreement ("Warren-Payne") regarding controlling legal principles. The lower court's conduct was thus in direct conflict with the deci-

sion of this Court in *Banco Nacional de Cuba v. Sabbatino, supra.*

II. The Decision Below Is in Conflict With Applicable Decisions of This Court Because It Failed to Recognize That the Warren-Payne Understandings Constituted a Valid Agreement Where the Said Agreement Had Been Negotiated and Proclaimed Under the Authority of the President.

The lower court's decision is in conflict with this Court's decision in *B. Altman & Co. v. U. S.*, 224 U. S. 583 (1911). The lower court failed to follow the principles which this Court recognized and established in *B. Altman & Co., supra.* This Court's decision in *Altman, supra,* established the principle that an international commercial agreement undertaken by the respective executive branches of two foreign governments will be accorded the respect of a treaty where the said agreement is negotiated between the representatives of the two sovereign nations, and made in the name and on behalf of the contracting countries, and is proclaimed by the president.

> "While it may be true that this commercial agreement * * * was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two foreign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the president. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty * * *"

In the instant case, the lower court held that the Warren-Payne Agreement did not constitute a recognizable international agreement, although the said agreement had been negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealt with important commercial relations between the two countries, and was proclaimed by the President. The lower court's decision was thus in direct conflict with the decision of this Court in *B. Altman & Co. v. U. S.*, 224 U. S. 583 (1911).

III. The Determination of the Validity and Effect of the Warren-Payne Agreement Is an Important Question Which Has Not Been, But Should Be, Settled by This Court.

The final determination of the validity and effect of the Warren-Payne agreement will affect this country's relations with a foreign government as well as our standing in the international community. The issues presented for review involve the enforceability of rights which were provided to the petitioner, and others similarly situated, pursuant to an understanding which was duly negotiated and adopted by the executive branch, and for which was given valuable consideration, i.e., formal recognition.

The judicial determination of the scope and effect of such an international undertaking will therefore affect the value and credibility which will henceforth be accorded other similar understandings and agreements which will, in the future, be undertaken as an incident of the executive branch's conduct of foreign affairs. In view of the international impact of the determination of the issues raised, it cannot be gainsaid that the resolution of those issues merit final determination by this honorable Court.

IV. The Decision Below Is in Direct Conflict With Applicable Decisions of This Court Because It Permitted the Respondent to Interpose the Defense of Act of State So as to Repudiate a Purely Commercial Obligation.

The lower court's decision is in conflict with this Court's decision in *Alfred Dunhill of London v. Republic of Cuba*, — U. S. —, 96 S. Ct. 1854 (1976). This Court's decision in *Dunhill, supra*, established the principle that a foreign sovereign or one of its commercial instrumentalities may not interpose the defense of Act of State so as to repudiate a purely commercial obligation.

> "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government, in the conduct of our foreign relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U. S., *supra*, at 427-428, 431, 433, 84 S. Ct., at 939-940, 941-942, 11 L. Ed. 2d, at 823, 825-826. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our court," at Page 1863 ". . . . We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," at Page 1867.

In the instant case, it cannot be gainsaid that Mexico is engaged in the commercial oil business and that the petitioner's claim is an obligation which arose in the course of Mexico's operation of that business. Consequently, the lower court's decision is in conflict with this Court's decision in *Dunhill, supra*, as it extended the concept of act of state to include the repudiation of a purely commercial obligation owed by a foreign sovereign and one of its commercial instrumentalities.

CONCLUSION.

For the reasons heretofore stated, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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1326 King Street,
Wilmington, Delaware,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1168

JAMES P. D'ANGELO, RECEIVER FOR PAPANTIA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Appellant

v.

PETROLEOUS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
C. A. No. 74-17

Argued September 8, 1977

Before: VAN DUSEN, ADAMS and HUNTER, *Circuit Judges.*

Judgment Order.

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

1. The recent decision of *Shaffer v. Heitner,* 45 U. S. L. W. 4849 (U. S. S. Ct. June 24, 1977) raises questions about whether the assertion of jurisdiction over Petroleos Mexicanos in this case comports with due process. Since we affirm the judgment in favor of Petroleos Mexicanos on other grounds, we need not reach the due process issue, or the related question whether such an objection has been waived. *See Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 346-47 (1936) (Brandeis, J., concurring).

Each side to bear its own costs.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: September 14, 1977

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 74-17

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Plaintiff,

v.

PETROLEOS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico,

Defendant.

William H. Bennethum, III, Esquire, Wilmington, Delaware, attorney for plaintiff,

Arthur G. Connolly, Jr., Esquire, of Connolly, Bove & Lodge, Wilmington, Delaware, attorney for defendant and Timothy P. Walsh, Esquire, of Hardin, Hess & Walsh, New York, New York, of counsel.

Opinion.

Wilmington, Delaware
July 16, 1975

STEEL, *Senior Judge:*

Plaintiff, James P. D'Angelo, is the receiver of Papantla Royalties Corporation ("Papantla"), a dissolved Delaware corporation, appointed by order dated December 21, 1956, of the Court of Chancery of Delaware. He has brought an action against the defendant, Petroleos Mexicanos, a decentralized governmental agency of the Republic of Mexico, a non-resident of the United States, for an order requiring the defendant to account to the plaintiff for oil produced from wells in Mexico in which he claims that Papantla and plaintiff have royalty or participation interests. The complaint alleges that the defendant was created by the Mexican government to manage and handle privately owned oil properties existing in Mexico which had been seized on or about March 18, 1938, for the purpose of nationalizing the oil industry. The complaint alleges that at the time, Papantla was the owner of certain oil royalties and participation rights in certain of the properties so expropriated by the Mexican government, and that those rights were never expropriated by the defendant or the Republic of Mexico. The amount in controversy is alleged to exceed the sum of $10,000, exclusive of interest and costs. The action is between a citizen of a state of the United States and a citizen of a foreign state, and is within the jurisdiction conferred by 28 U. S. C. § 1332(a)(2).

Following a determination by the Court that the defendant was subject to its quasi in rem jurisdiction by virtue of a sequestration of its property, *D'Angelo v. Petroleos Mexicanos*, 378 F. Supp. 1034 (D. Del. 1974), the defendant appeared generally and answered the complaint. The case is now before the Court upon cross motions for summary judgment based upon the pleadings, depositions, answers to interrogatories, admissions on file and affidavits.

Defendant's motions are based upon the grounds that (a) the act of state doctrine precludes the Court from considering the merits of plaintiff's claim, (b) the statute of limitations and/or laches bars the claim, and (c) the doctrine of forum non conveniens requires a dismissal of the action. Plaintiff seeks a summary judgment on the basis of the record.

DEFENDANT'S MOTIONS.

Act of State Doctrine.

A large part of the evidence which plaintiff relies upon in resisting defendant's motion for summary judgment rests upon the testimony of one Roscoe B. Gaither, Esquire, which at this juncture must be accepted as true.* Under Mexican law prior to the adoption of the Constitution of 1917, the owner of the surface of land owned the oil in the subsoil.** This was changed by Article 27 of the Mexican Constitution of 1917. This Article provided that the Mexican nation owned the oil in the subsoil and permitted exploitation only in accordance with ". . . concessions [granted] by the [Mexican] Federal Government, to private individuals or civil or comercial (sic) corporations that are constituted according to Mexican laws.

* Gaither was the "father" of Papantla and its chief spokesman. He was a man of considerable distinction. He became a member of the New York bar in 1924 and specialized in Latin-American law, particularly in Mexican law. He spoke Spanish fluently since boyhood as a result of having had Mexican nurses, and French as a result of a year spent at the Sorbonne. Some part of his adult life had been spent working in Venezuela and Mexico for oil companies.

** See Mining Code of the United Mexican States. Mexico 22 November 1884, with slight variation in terminology but not in substance in the Mining Law of United Mexican States. June 4, 1892 and the Mining Law of the United Mexican States. Mexico 25 November 1909. See Doc. 63A.

. . ." *** Nationals of foreign countries who had been in Mexico and developed the oil prior to the adoption of the 1917 Constitution protested against the non-recognition of the rights which they had acquired before the enactment of the Constitution. Because of the protests of foreign governments, including Great Britain, Holland and the United States, to the deprivation of rights in oil acquired by their nationals prior to 1917, meetings were held between them and representatives of the Mexican government in Mexico City beginning on May 15, 1923. These were known as the Bucareli Conferences. As a result a number of agreements were entered into between the Mexican government and certain of the foreign nations, including the United States, represented by Messrs. Payne and Warren. The United States' agreement, known as the Payne-Warren Agreement, gave recognition to the pre-constitutional rights of the landowners, through many of whom rights of foreign nationals were derived. This agreement was confirmed by the Petroleum Law of December 26, 1925. Thus, Mexican law was changed so that landowners who were able to prove to the satisfaction of the Mexican government that they had intended to utilize the oil in the subsoil prior to May 1, 1917, could acquire a confirmatory concession which permitted exploitation for up to 50 years. A decree dated January 3, 1928, modified this law and made the concessions good for an unlimited period of time.

The title of Papantla to the "royalties and participation rights" upon which plaintiff, as Papantla's receiver, based his claim derived from confirmatory concessions. Acting under powers of attorney from numerous land-

*** The Mexican government, as owner of oil in the subsoil, leased the subsoil rights to the oil companies for limited periods of time. These were known as "ordinary concessions" to distinguish them from "confirmatory concessions."

owners, Gaither had filed with the head of the legal department of the Department of Economy of Mexico, (1) proof of title of certain landowners claiming the subsoil rights, and (2) proof positive of their intention prior to 1917 to use the oil in the subsoil. As a result of this action 576 confirmatory concessions were acquired by Papantla, as appears from the records in the defendant's own files.

After the confirmatory concessions were obtained, Gaither made arrangements with the landowners so as to permit the development by the big oil companies of the concessions which he had obtained for the landowners. About two-thirds of the 576 confirmatory concessions were leased or sold to the oil companies.*

Two of the major deals which Gaither made were with Sinclair Oil Company and Aguila, a Dutch Shell subsidiary. Under the contracts which Gaither made with them, Shell was given an 89% interest in the oil produced and Sinclair an interest of 87½%. A 5% interest was reserved to the landowners, 3% was reserved to intermediaries who had assisted Gaither as interpreters or guides in making contact with the Indian landowners, and the remaining interest was reserved for Gaither and by him assigned to Papantla.

By a presidential decree of March 18, 1938, certain properties of specified oil companies were expropriated. The decree reads:

> "Decree which expropriates in favor of the Patrimony of the Nation, personal and real properties belonging to the oil companies who refused to accept the decision of the 18th of December of 1937 of group number 7 of the Federal Board of Conciliation and Arbitration.

* Confirmatory concessions which were not leased or sold were retained by Tagin Company and are of no concern in this litigation.

> There is expropriated by reason of public utility in favor of the Nation; the machinery, installations, buildings, —pipelines, refineries, storage tanks, ways of communication, tank cars, distribution stations, embarcations and all of the other personal property and real property of: Compania Mexicana de Petroleo El Aguila, S.A., Compania Naviera De San Cristobal, Compania Naviera San Ricardo, S.A.; Suasteca Petroleum Company; Mexican Sinclair Petroleum Corporation; Stanford y Company Sucesores, S. en C.; Penn Mex Fuel Company, Sinclair Oil, Pierce Oil Company; Richmond Petroleum Company de Mexico; Compania Petrolera el Agwi, S.A.; Compania de Gas y Combustible Imperio; Consolidated Oil Company of Mexico; Compania Mexicana de Vapores San Antonio, S.A.; Sabalo Transportation Company; Clarita, S.A. y Cacalilao, S.A., in amounts as may be necessary in the opinion of the Secretariat of National Economy for the discovery, production, transportation, storage, refinery and distribution of the petroleum industry."

Among the 17 companies specified in the decree were those which had acquired or leased from Gaither on behalf of Papantla interests in the confirmatory concessions, which Gaither had acquired for the landowners.

Following the expropriation the defendant was formed, and through it Mexico went into the oil business, carrying on production, transportation, refining, manufacturing and the sale and export of petroleum products in and from Mexico.

By paragraph 5 of its answer to the complaint the defendant has "[a]dmitted that prior to the Mexican expropriation in 1938 Papantla owned certain oil royalties or participation rights". However, the same paragraph denies that "after the Mexican expropriation in 1938 Papantla had

any right to oil royalties or participation rights and therefore denie[s] that any money is owed to Papantla or to plaintiff." * In short, defendant contends that the rights of the holders of the confirmatory concessions and of persons having any interest therein, including Papantla, were extinguished by the Mexican expropriation in 1938.

On the other hand, plaintiff maintains that the expropriation decree related solely to the physical properties owned by the 17 oil companies specified in the decree and to their interests in any confirmatory concessions [*] but had nothing to do with the interest which Papantla and others had retained in those concessions.

Plaintiff asserts that the confirmatory concessions were a "breed apart" and were dealt with by a "treaty agreement" between the United States and Mexico, and since the expropriation decree was silent as to the interest held by Papantla and others it was never intended to extinguish those rights. By "treaty agreement" plaintiff apparently means the Payne-Warren Agreement stemming from the Bucareli Conferences.

Defendant contends that under the act of state doctrine the Court should refrain from adjudicating the issue thus posed by plaintiff. That doctrine found early expression in *Underhill v. Hernandez*, 168 U. S. 250 (1897), where Chief Justice Fuller said for a unanimous Court:

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* In the complaint plaintiff claims to be the owner of "royalties or participation rights" in Mexican oil. Much of Gaither's deposition refers to "confirmatory concessions". For purposes of the act of state motion neither of the parties has made a distinction between "royalties or participation interests" and the "confirmatory concessions".

[*] At page 75 of Gaither's deposition he said: (Doc. 63A)

"The Shell company had only eighty-nine percent. In the case of the Sinclair company, they had only eighty-seven and a half. That could be expropriated. But not the royalty belonging to Papantla Royalties Corporation."

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Id.* at 252.

No subsequent case "in which the act of state doctrine was directly or peripherally involved manifest[s] any retreat from *Underhill*." *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1963). In the later case of *First National City Bank v. Banco Nacional de Cuba*, 406 U. S. 759, 763 (1972), the Court referred to the above quotation from *Underhill* as the "'classic American statement' of the [act of state] doctrine. . . ." It said that it was a doctrine "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *Id.* at 762.

In considering whether the act of state doctrine has any relevance to the present case it is important to distinguish between the type of issue which lies at its heart, and the one of present concern which is beyond its purview. The question of the *validity* of the expropriation decree is *not* here in issue. The *validity* of an expropriation decree or other governmental act *was* the subject of most of the cases in which an act of state was held to preclude judicial challenge. Plaintiff does not assail the *validity* of the expropriation decree to divest owners of whatever property the decree was intended to expropriate. Gaither, when asked whether Papantla claimed that the 1938 expropriation itself was unlawful, replied: "Far be it from me to disagree with the Supreme Court of Mexico

which claimed that it was lawful".* Plaintiff rests his case not upon any claim of invalidity of the decree but upon the argument that properly *interpreted* the decree did not encompass any of the confirmatory concessions or interests therein other than those owned or leased to the 17 oil companies; in short, plaintiff argues that Papantla's interests in the concessions were beyond the scope of the decree and that they survived it. The issue then is one which goes to the scope or meaning of the decree, not to its validity; that is, whether or not there was in fact an act of state which affected Papantla's interests.

This is a significant distinction. Whereas courts have interposed the doctrine to prevent a judicial adjudication of the validity of a foreign governmental act, they have not done so when a question concerns the interpretation of the act.

In *Banco Nacional de Cuba v. Sabbatino*,[•] the District Court had before it both questions of interpretation and validity of an act of state. The defendant asserted that the Cuban act of expropriation of sugar was not sufficiently broad to embrace a contractual right in sugar against the contention of the plaintiff to the contrary. The Court first determined the construction question, rejecting the defendant's position, 193 F. Supp. at 378-79. Only then did it proceed to discuss the application of the act of state doctrine in its relationship to plaintiff's attack upon the validity of the decree and held that since the decree was "a patent violation of international law, the Court

* However, Gaither has been critical of the expropriation nevertheless. In his book "Expropriation in Mexico, The Facts and The Law", Gaither suggests that the Supreme Court of Mexico "denied justice" when it sustained the expropriation. The opinion of the Supreme Court of Mexico which Gaither refers to is not a part of the record.

[•] 193 F. Supp. 375 (S. D. N. Y. 1961), *aff'd.* 307 F. 2d 845 (2d Cir. 1962), *rev'd.* 376 U. S. 398 (1964).

[would] not enforce it," 193 F. Supp. at 386. The decision was affirmed by the Second Circuit Court of Appeals and ultimately was decided by the Supreme Court. There the Supreme Court reversed the lower court's decision with respect to the validity of the decree and held that the act of state doctrine precluded judicial inquiry into the validity of the decree and necessitated its enforcement. However, the Court approved the action of the lower courts in enterpreting the scope of the decree. By affirming the decision as to the construction issue, the Supreme Court • and Court of Appeals,•• impliedly held that the act of state doctrine did not preclude judicial determination of such issues.

In *Shapleigh v. Mier*, 299 U. S. 468 (1937) the question was whether the title of plaintiff to property had been divested by a Mexican expropriation decree. The Court held that the effect of the decree was to divest plaintiff of his title to the property. The legality of the decree was not in issue nor discussed. Noting the distinction between the efficacy of an expropriation decree and its validity, Mr. Justice Cardozo, speaking for a unanimous Court, said:

> "The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law. . . . What concerns us here and now is the efficacy of the decree under the land law of Mexico at the date of its proclamation to extinguish hostile claims of ownership and pass the title to another." *Id.* at 471.

Since the validity of the decree was not questioned but only its effect, the Court determined the latter question without discussing the act of state doctrine.

• 376 U. S. at 413.

•• 307 F. 2d at 854, n. 5.

Compare *United States v. Pink*, 315 U. S. 203 (1942) where the question was whether a Russian decree of nationalization of insurance companies was intended to have an extra-territorial effect on their funds in the United States. The Commissariat for Justice of the R. S. F. S. R. gave his opinion that the decree was intended to have such an effect. The Court held that "this official declaration was conclusive", as to what, as a matter of Russian law, the decree was intended to accomplish. *Id.* at 220. The Court's opinion did not discuss the act of state doctrine. In the case at bar, so far as the record discloses, there has been "no official declaration" by the Republic of Mexico as to whether the expropriation decree of 1938 was intended to divest plaintiff and others similarly situated of their rights in the confirmatory concessions and interests thereunder. Had the record revealed such an "official declaration" such interpretation might perhaps be deemed to constitute an act of state which would preclude this Court from making an independent examination of the effect of the decree. This, however, is not presently decided.

Defendant's motion for summary judgment based upon the act of state doctrine will be denied.

Statute of Limitations and/or Laches

Where the jurisdiction of a federal court is invoked upon the basis of diversity of citizenship, it will apply the period of limitation which a similar state forum would apply to the end that the effect of the decision will be no different than it would have been if the action had been brought in the state court. *Guaranty Trust Company v. York*, 326 U. S. 99, 110 (1945). Defendant concedes that the same rule applies when the jurisdiction of the federal court rests upon "alienage", (D. O. B., Doc. 62, p. 16).

This would seem to be true where, as here, the claims are not federal in their origin.

The question is posed, therefore, whether or not a Delaware state court would hold the action to be time barred. The complaint sounds in equity, that is, it seeks an accounting against the defendant.* However, insofar as it seeks monetary relief it is an action which is analogous to an action at law for a money judgment. *Artesian Water Co. v. Lynch*, 283 A. 2d 690 (Del. Ch. 1971). In *Bokat v. Getty Oil Co.*, 262 A. 2d 246 (Del. 1970) the Court said:

> "[w]hen the relief sought in Chancery is legal in nature, it is clear that Chancery will apply the statute of limitations rather than the equitable doctrine of laches. Perkins v. Cartmell, Adm'r, 4 Harr. 270; Cochran v. F. H. Smith Co., 20 Del. Ch. 159, 174 A. 119 [(1934)]". *Id.* at 251.

Accordingly, the statute of limitations rather than the doctrine of laches is controlling.

The defendant contends that this is an action for a debt and as such is barred by the Delaware three year statute of limitations found in 10 Del. C. § 8106 (1974), or alternatively, if the Delaware "borrowing" statute is applicable, by the Mexican statute of limitations which defendant contends is ten years. Thus, defendant argues that under either the Delaware or Mexican limitations law, the action is time barred. The Delaware borrowing statute, 10 Del. C. § 8121 (1974) provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply. (46 Del. Laws, c. 254, § 1; 10 Del. C. 1953, § 8120).

* Plaintiff has invoked a jurisdiction traditionally possessed by the Delaware Court of Chancery and has utilized the sequestration procedure which is available only in the Court of Chancery.

Papantla, which originally possessed the cause of action, is a Delaware corporation and plaintiff D'Angelo is a resident of Delaware and a Receiver appointed by the Court of Chancery of Delaware. Accordingly, the last sentence in the borrowing statute makes Delaware limitations law controlling rather than Mexican law.

Section 8106, which contains the three year period of limitation relied upon by the defendant, has application only to a "debt not evidenced by a record or by an instrument under seal". Plaintiff contends that the confirmatory concessions or plaintiff's interest therein which are the basis of his claim are evidenced by records in the office of the defendant and hence the indebtedness which the defendant owes to him is evidenced "by a record" within the meaning of Delaware law. Since Delaware has no statute of limitations dealing with a debt "evidenced by a record", plaintiff, relying upon *Farmers Bank v. Gardner's Adm'rs*, 4 Harr. 430 (Super. Ct. 1846) argues that the common law rebuttal presumption of payment or satisfaction after the lapse of twenty years alone defines the applicable time limitation. He claims that statements in the Gaither deposition concerning promises by the defendant to pay the plaintiff, and indeed some small payments which the defendant actually made to plaintiff, rebut the presumption.

The record discloses that the payments which were made to plaintiff were minimal and defendant points to

evidence suggesting that they were made because of the nuisance value of the claims rather than in recognition of their validity. These are factual issues, which if relevant, can be resolved only after a trial. The same thing is true of the issue whether the claims are "evidenced by a record" within the meaning and intendment of the Delaware law. Thus, on this ground alone, summary judgment based upon the statute of limitations and/or laches should be denied. Moreover, even assuming that the three year period control, as urged by defendant, other legal considerations preclude the grant of summary judgment.

When plaintiff's cause of action against the defendant arose the defendant was a foreign corporation. It never qualified to do business in Delaware as a foreign corporation.* As an unqualified foreign corporation defendant was not subject to in personam process served upon the Secretary of State under 8 Del. C. § 382 (1974) since the transaction upon which plaintiff's claim is based did not arise in Delaware.

These circumstances focus attention on 10 Del. C. § 8117 (1974) which reads:

> "If at the time when a cause of action accrues against any person, he is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, he may be served with process. If, after a cause of action shall have accrued against any person, he departs from and resides or remains out of the State, the

* This was ascertained by the Court from Miss Jackie George of the Secretary of State's Office. While recognizing that it is somewhat irregular to go outside of the record, the Court felt that it was warranted in doing so to put at rest one phase of this litigation. If the defendant wishes to contest the accuracy of the information which the Court received from the Secretary of State's Office, it may do so by filing an appropriate motion.

> time of his absence until he shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. (Code 1852, § 2751; 20 Del. Laws, c. 594; 25 Del. Laws, c. 234; Code 1915, § 4680; Code 1935, § 5138; 10 Del. C. 1953, § 8116.)"

The relevance of this provision to the instant case requires consideration in the light of *Glassberg v. Boyd*, 35 Del. Ch. 293, 116 A. 2d 711 (1955). *Glassberg* held that the tolling provisions of the then section 8116 of the Code of 1953 (now section 8117) could not be read into the "borrowing statute", then section 8120 of the Code of 1953, (now section 8121). This was because, the Court said, section 8120 was enacted in 1947, long after section 8116 was passed, and since section 8120 was passed with reference to a specific subject—out of state causes of action —and made no mention of the pre-existing savings clause in section 8116, the Legislature must have intended section 8120 to exclude the savings clause of section 8116. The action in *Glassberg* was begun by a non-resident. Because of this the decision is without pertinence to the instant action where the plaintiff and his predecessor were and are Delaware residents. In *Pack v. Beech Aircraft Corp.*, 50 Del. 413, 132 A. 2d 54 (1957), the Court in referring to the last sentence in the Delaware borrowing statute, said "the common law rule that the *lex fori* governs the matter of limitations of actions [as to a resident plaintiff] is left in full force" 132 A. 2d at 57, and the rights of Delaware plaintiffs "shall be uneffected by the change", *id.*, that is, the enactment of the borrowing statute (46 Del. Laws, c. 254, § 1 (1947)).

Prior to the enactment of the borrowing statute the law in Delaware was clear. Chapter 123 of the Code of 1852 is entitled "Limitation of Personal Actions". Section

6 of Chapter 123, Del. Rev. Stats. § 2742 (1852), is the forerunner of the three year statute of limitations presently found at 10 Del. C. § 8106 (1974). Section 14 of Chapter 123, Del. Rev. Stats. § 2751 (1852) is the historical counterpart of the present tolling provision found in 10 Del. C. § 8117 (1974) which is operative when a defendant is absent from the state. For over 120 years a tolling provision like section 8117 has been part and parcel of the three year statute of limitations.* There is no reason to believe that the last sentence in the borrowing statute, section 8121, which simply had the effect of perpetrating prior law for a resident plaintiff, was intended to deprive him of the tolling provisions which he would otherwise have had.

The defendant has never been in the state of Delaware and personal service upon it has always been impossible. A number of cases have stated, however, that so long as the equivalent of personal service can be obtained upon a non-resident the tolling provisions of 10 Del. C. § 8121 (1974) are not applicable. See, for instance, *Hurwitch v. Adams,* 52 Del. 247, 155 A. 2d 591 (1959) (service possible under Non-Resident Motorist Act, 10 Del. C. § 3112 (1974)); *Molitor, Inc. v. Feinberg,* 258 A. 2d 295 (Del. Super. Ct. 1969) (service on Non-Resident Doing Business in the State, 10 Del. C. § 3104 (1974)); *Klein v. Lionel Corp.,* 130 F. Supp. 725 (D. Del. 1955) (long arm service under the Clayton Act, 15 U. S. C. § 22 (1973)); *Wilkes v. Wrangell & Co.,* 293 F. Supp. 522 (D. Del. 1968) (service under admiralty law by attachment of vessel). In all of these cases, however, the service was the equivalent to

* This distinguishes the case of *Lewis v. Pawnee Bill's Wild West Co.,* 22 Del. 316, 66 A. 471 (1907) wherein it was held that the tolling provisions of Chapter 123 of the 1852 Code had no reference to the one year statute of limitations application to personal injury actions, since the latter was not passed until 1897 (20 Del. Laws, c. 594, § 1 (1897)).

personal service on the defendant because in each case the service was sufficient to have permitted the Court to have rendered an in personam judgment against the defendant.

Defendant argues that since the tolling statute has been held to be inapplicable to an absent defendant who is otherwise subject to service, it should likewise be held to be without relevance in this case in view of the fact that quasi in rem process, that is foreign attachment or sequestration, could have been availed of. It points to *Hurwitch v. Adams, supra; Lewis v. Pawnee Bill's Wild West Co., supra;* and *Bokat v. Getty Oil Co., supra,* as supporting this view.

In *Lewis v. Pawnee Bill's Wild West Co., supra,* the action for personal injuries was begun against a foreign corporation by foreign attachment more than one year (the period of limitation) after the cause of action accrued, but within one year after the defendant first brought property into the state. At the time there was no tolling provision relating to personal injury claims * and the Court held that the action was barred by the one year statute. It said:

> "In the present case the plaintiff might have commenced her action by foreign attachment within one year from the time her cause of action accrued, and kept it alive by alias and pluries writs until the

* The tolling statute based upon the absence of a defendant was part of the law in 1852, section 14 of Chapter 123 of the Revised Code of 1852, Del. Rev. Stats. § 2751 (1852). The one year limitation period was first enacted in 1897, 20 Del. Laws, c. 594, § 1 (1897) and made no reference to the tolling statute. Because of this the Court said:

> "Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of the court to do so." 66 A., at 474.

> defendant brought its property within reach of process, which it did in about two years after the injuries complained of." 66 A. at 474.

This statement was made in a case where no tolling statute existed. In these circumstances the statement is quite understandable. It is entirely inapposite, however, to the present case where the tolling statute has always been a part of the three year statute of limitations. Sections 6 and 14 of Chapter 123 of the Code of 1852, entitled "Limitation of Personal Actions", Del. Rev. Stats. §§ 2742, 51 (1852). Today both sections are a part of 10 Del. C., Chapter 81 (1974) entitled "Personal Actions". 10 Del. C. §§ 8106, 17 (1974).

Hurwitch v. Adams, supra, and *Bokat v. Getty Oil Co., supra,* have even less relevance than the *Pawnee Bill* case. *Hurwitch* held that 10 Del. C. § 8116 (1953) (the equivalent of the present 10 Del. C. § 8117 (1974) was ineffective to toll the period of limitations when the non-resident motorist could have been served within the statutory period under the Non-Resident Motorist Act. As indicated, this service is "the equivalent of personal service". In *Bokat, supra,* the Court held that although the action had been begun before the statute of limitations had run, it was nevertheless barred because plaintiff had waited until the statute had expired before sequestering the property of the defendant. The opinion did not even mention the tolling statute since, the action having been commenced before the statutory period had expired, the tolling statute was irrelevant.

Shreve's Adm'r. v. Wells & Sappington, 7 Del. (2 Houst.) 209 (Super. Ct. 1860), *rev'd,* 7 Del. (2 Houst.) 329 (1861), is the case which most clearly indicates the decision which a Delaware court would come to if it were faced with the question whether an action begun by

sequestration was subject to the tolling provisions of section 8117 if the three year statute of limitations was relied upon as a defense. It, unlike *Pawnee Bill,* was concerned with a statute of limitations which *was* subject to the tolling provisions based upon the absence of the defendant.* In it plaintiff had brought suit on promissory notes by issuing a writ of foreign attachment against the absent defendants after the statutory period of limitations of six years had expired. The defendants pleaded the statute. By replication plaintiff sought to bring himself within the savings clause of section 14 of Chapter 123 of the Code of 1852, Del. Rev. Stats. § 2751 (1852), the equivalent of the present 10 Del. C. § 8117 (1974), to avoid the bar of the six year period of limitations. The demurrer of the defendant to the replication was based upon the alleged insufficiency of its pleading. The Superior Court, in a two to one decision, overruled the demurrer and rendered judgment for the plaintiff, 7 Del. (2 Houst.), at 222.

This decision was reversed by the Court of Errors and Appeals in a two to one decision, Chancellor Harrington and Judge Houston writing separate opinions for the majority, and Judge Wooten writing a dissenting opinion. While Chancellor Harrington and Judge Houston expressed themselves somewhat differently, they each agreed that the replication was inadequate to bring the plaintiff within the savings clause of the statute. They said it was not enough for plaintiff to have alleged that the defendants were absent from the state when the cause of action accrued and that from that time until the day the replication was filed they "*resided*" out of the state, but that an allegation of continued *absence* until six years before the com-

* Both the six year limitations period and the tolling provision based on the absence of a defendant were part of Chapter 123, entitled "Limitations of Personal Actions"; See sections 8 and 14, Del. Rev. Stats. §§ 2744, 51 (1852).

mencement of the action was essential. The majority of the court inherently recognized that if the plaintiff had pleaded that defendants were absent from the state when the cause of action accrued and that they continued to be absent up to within six years of the commencement of the suit, the tolling statute would have saved the claim from the limitations defense notwithstanding that the action had been begun by foreign attachment. Chancellor Harrington said:

> "The question then is, has the plaintiff replied this exception? Does the replication in any frame of words, say that the defendants were out of the State when the cause of action accrued and continued to be out of it either hitherto, or up to any time within six years of commencing the suit? That is what is denied by the demurrer, and that is the issue upon which the case turns. If the replication says this, the plaintiff avoids the bar of the statute and is entitled to judgment; if it does not allege such absence of the defendants from the State, or out of the jurisdiction of this court, the act bars his suit and he cannot recover." 7 Del. (2 Houst.), at 345.

Judge Houston said that the opinion of Chancellor Harrington was "clear and satisfactory", *id.* at 354. He addressed himself to the argument that the savings clause was without application to an action begun by foreign attachment and rejected it, saying:

> "[t]here is therefore no good reason for holding that such a case as this, is not within the meaning and intention of the saving contained in the first paragraph of the fourteenth section of the statute." *Id.*, at 370.

Judge Wooten's dissenting opinion is consistent with the views of the majority that the tolling due to the non-

residence of the defendants is applicable to an action begun by foreign attachment. Judge Wooten disagreed with the majority only in its conclusion that the replication was insufficient to give plaintiff the benefit of the tolling statute. He stated expressly that the law made no distinction in the application of the tolling statute between cases begun by summons and those commenced by foreign attachment, and that "[o]ne who could only be found by thus seizing his property, [was] not among those for whose benefit the statute of limitations was enacted . . . ." *Id.*, at 353.

The *Wells & Sappington* case was, of course, decided by both courts on a pleading issue. But its basic significance is substantive. It is crystal clear, however, that all of the five judges * who considered the question in the Superior Court and in the Court of Errors and Appeals were of the view that the statute of limitations would have been tolled during the absence of the defendants, provided that the plaintiff had properly pleaded the savings clause of the statute, and that this was true even though the action was begun by foreign attachment. While the *Wells* decision was rendered over 100 years ago its soundness has never been questioned.

A majority of the courts in other jurisdictions have held as did Wells, that a statute which provides for the tolling of a period of limitations during the absence of a defendant does not lose its vitality because a defendant has property within the jurisdiction which is subject to quasi in rem process during the limitation period. *500 Fifth Ave. v. Crone,* 171 F. Supp. 707 (W. D. Mo. 1959) (applying New York law); *Waterman v. Sprague Mfg. Co.,*

* They included two judges (unidentified in the Superior Court report of the case) who held that the demurrer to the replication should be overruled, Houston dissenting, and the three judges, including Houston, who sat on the Court of Errors and Appeals.

55 Conn. 554, 12 A. 240 (1888); *Kimball v. Kimball,* 35 Ga. 462, 133 S. E. 295 (Ct. App. 1926); *Grist v. Williams,* 111 N. C. 53, 15 S. E. 889 (1892); *Moss v. Standard Drug Co.,* 159 Ohio 464, 112 N. E. 2d 542 (1953); *Electric Supply Co. v. Garland,* 118 Okl. 21, 105 P. 2d 758 (1940). *See also* 51 Am. Jur. 2d, Limitations of Acuons, § 163 (1970) and 119 A. L. R. 337-42.

However, whether or not section 8106 is subject to an interpretation that the tolling period comes to an end when the defendant first has property in Delaware which plaintiff could seize, has not been argued nor is it now decided. Facts which may be pertinent to this question do not appear of record. Possibly of significance would be the time when defendant first owned property in Delaware, its nature, whether its presence was known to plaintiff or with due diligence should have been known to him, and if so when, and the relationship of the value of the property to the size of plaintiff's claim.

The motion of the defendant for summary judgment based upon the statute of limitations and/or laches is denied.

Forum Non Conveniens

Defendant asks that the doctrine of forum non conveniens be applied and the case dismissed stating that a Mexican court would be the proper forum for determining the factual and legal issues that have arisen in this case. The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is otherwise authorized by the matter of the law. *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 507 (1947). The application of the doctrine leaves much to the discretion of the court, *id.,* at 508. The limitation on its exercise is narrower than under the transfer statute, 28 U. S. C.

§ 1404(a), which was later enacted. *Norwood v. Kirkpatrick,* 349 U. S. 29 (1955). Although the *Gilbert* decision was rendered prior to the enactment of section 1404(a), federal courts still have inherent power to refuse jurisdiction under the forum non conveniens principle, *Prack v. Weissinger,* 276 F. 2d 446, 448 (4th Cir. 1960) and *Vanity Fair Mills v. Eaton Co.,* 234 F. 2d 633, 645 (2nd Cir. 1956), *cert. denied,* 352 U. S. 871 (1956) and the considerations mentioned in *Gilbert* have continued vitality, *Fitzgerald v. Westland Marine Corp.,* 369 F. 2d 499, 501 n. 3 (2nd Cir. 1966).

The "important considerations" to be weighed in determining whether a case should be dismissed on the principle of forum non conveniens are stated in the *Gilbert* case to be:

> "[t]he relvative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial." 330 U. S. at 508.

While *Gilbert* held that the action should be dismissed there can be no doubt that the Court was considerably influenced by the fact that the plaintiff who resided in Virginia left Virginia to bring suit in New York "without even a suggested reason for transporting th[e] suit to New York", *id.* at 510. All relevant phases of the case took place in Virginia. The Court said that "the plaintiff may not, by choice of an inconvenient forum, 'vex',

'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy," *id.* at 508. It continued:

> "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

In *Koster v. Lumbermen's Mutual Co.*, 330 U. S. 518 (1947) the Court again emphasized the importance to be placed upon the plaintiff's choice of his home forum, saying:

> "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice." *Id.* at 524.

In *Thompson v. Palmieri*, 355 F. 2d 64, 66 (2nd Cir. 1966) the Court said that a court should respect plaintiff's choice of forum so long as its selection has not been for the purpose of vexing or harassing the defendant.

Defendant disregards the reasonableness of plaintiff's determination to sue in Delaware. It focuses instead only on the inconvenience which it will sustain if the action is tried here. It points out that many questions of Mexican law will be involved in a trial on the merits, key witnesses are domiciled in Mexico, voluminous documentary evidence upon which plaintiff bases its claim is on file in Mexico under the control of an agency of the Mexican government, the documents are in Spanish, and this Court is without compulsory process power to compel the attendance of unwilling non-party witnesses located in Mexico, and the costs and inconvenience of transporting willing witnesses from Mexico to Delaware will be severe.

The question of the expense that the defendant would be put to if suit were brought in Delaware requires scant

consideration when the relative positions of the parties are weighed. Plaintiff is without sufficient funds to proceed in Mexico while the defendant is a multi-million dollar corporation. To require plaintiff to go to Mexico to proceed with the suit would probably leave him without a remedy. (D'Angelo Affidavit, March 10, 1975, Doc. 70, ¶ 10.)

Furthermore, the argument of the defendant that a trial in Delaware would entail excessive expense and inconvenience seems somewhat overwrought insofar as the resolution of the initial question is concerned, namely, whether the expropriation decree, properly construed, encompassed the confirmatory concessions and interests which are the basis of plaintiff's claim. This would appear, at the moment at least, to be determinable primarily, if not exclusively, on the basis of expert testimony.* If this question should be resolved in the defendant's favor this would end the law suit. On the other hand, if plaintiff should prevail much of the evidence pertinent to the accounting could and would probably be developed in pretrial procedures conducted either in Mexico or Delaware with a measure of control, including the imposition of costs, in the hands of the Court.

The fact that the success or failure of plaintiff's case depends upon the law of Mexico does not, of itself, justify a dismissal. There may be difficulties in attempting to determine and apply foreign law but the rules of the foreign law and their interpretation are simply questions of fact and involve difficulties no different from those which the

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* Upon application of either of the parties, or perhaps without such an application, the Court would consider adjudicating this issue in advance of the accounting. This step-by-step determination would be analogous to the procedure frequently followed in patent cases where patent validity and infringement are determined initially, followed by an accounting if necessary.

federal courts sometimes experience in attempting to determine the law of other state jurisdictions. *Burt v. Isthmus Development Co.*, 218 F. 2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U. S. 992. The interpretation of the law of a foreign country is a task from which federal courts do not shrink. *Lesser v. Chevalier*, 138 F. Supp. 330 (S. D. N. Y. 1956).

In *Vanity Fair Mills v. Eaton Co., supra*, at 646, it was said that courts of the United States are reluctant to apply the doctrine of forum non conveniens when it would force an American citizen to seek redress in a foreign court. Indeed, in *States Marine Lines, Inc. v. The M/V Kokei Maru*, 180 F. Supp. 255 (N. D. Cal. 1959) the Court said that *Gilbert* which applied the forum non conveniens doctrine as between American domestic forums is not directly in point where the choice lies between an American forum and that afforded by a foreign nation. *Id.*, at 257.

In *Stewart v. Godoy-Sayan*, 153 F. Supp. 544 (S. D. N. Y. 1957) plaintiff, in arguing against a dismissal under forum non conveniens, contended that the court was without power to deny citizens of the United States access to a federal court and compel them to litigate in a foreign country. The Court said that there seemed to be no case which definitely passed on this question where the citizen was suing in his own right, *id.*, at 546. It pointed out that in *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Og Australi Line*, 65 F. 2d 392 (2nd Cir. 1933) Judge Learned Hand had said by way of dictum that the citizen's right to access to the federal court when he sues in his own right is conclusive against remission to a foreign jurisdiction under the doctrine of forum non conveniens. In *Stewart* the Court said:

> "There is every reason for following Judge Hand's dictum in the Den Norske case so my only question is whether or not plaintiffs sue 'in their own right' within his meaning." •

In the *States Marine Lines* case the Court also stated that other authorities (citing them) have pointed out that no court has ever applied the doctrine of forum non conveniens to decline jurisdiction to a United States citizen suing in his own right in the absence of some express agreement to seek his remedy in a foreign forum, and that other authorities (citing the *Den Norske* case) have implied that the doctrine may not be thus applied, 180 F. Supp., at 257.

In *The Saudades*, 67 F. Supp. 820 (E. D. Pa. 1946) plaintiffs, American citizens, brought a libel in personam against two Portuguese companies by obtaining jurisdiction by foreign attachment of credits in the district. Judge Kirkpatrick refused to dismiss the action upon the ground of forum non conveniens. After stating that no decision had been called to his attention and that he had found none in which the right to maintain in an American court a suit of which the court had jurisdiction had been refused to an American litigant suing in his own right, and after noting Judge Hand's dictum in the *Den Norske* case, Judge Kirkpatrick said:

> "Perhaps the best way to put the rule, so far as it can be gathered from more or less indirect references to it in the decisions, is, that an American court may not refuse to try a case brought by an American citizen, unless it feels that injustice would be done by allowing him to proceed in his own court. The result of such a rule is that the discretion of the court, so far

• 153 F. Supp., at 547. Since plaintiffs were stockholders of a Cuban corporation and were claiming that wrongs were done to it by another Cuban corporation, as a result of a Cuban transaction, the Court held that they were not suing in their own right but in effect derivatively. *Id.*

as it has any existence, is limited, and that mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it to refuse jurisdiction. In the present case, while it is obvious that considerations of convenience make for the trial of the issue by the courts of Portugal, it does not appear that the case can not be tried here without entire justice to both parties." Id., at 821.

In *Mobile Tankers, Co. v. Mene Grande Oil Co.*, 363 F. 2d 611 (3rd Cir. 1966) *cert. denied*, 385 U. S. 1011, the Court said:

"A citizen of the United States may have no absolute right to have his case tried in a federal court but his election of such a forum should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the respondent. (citations omitted). This is so even though the more convenient forum may be the foreign one. *The Saudades, supra.*" *Id.*, at 614.

By its reference to *The Saudades* the Court of Appeals affirmed the *Saudades* principle that "mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it [s discretion] to refuse its jurisdiction" and said there can be no justification for a dismissal in the absence of "persuasive evidence that the retention of jurisdiction will result in manifest injustice", *id.*, at 614.

There is no evidence in the record in the instant case which could possibly support the conclusion that a trial in Delaware would result in manifest injustice. By contrast, even if the existence of the power to dismiss is assumed, the effect of a dismissal would be clearly unjust to the plaintiff.

The motion of the defendant for summary judgment based upon forum non conveniens is denied.

PLAINTIFF'S MOTION

This requires only brief discussion. As the record now stands, the evidence as to whether plaintiff's rights were divested by the decree is in conflict.

Gaither, although an interested party, was well qualified to speak on the point. Time and again during his deposition he expressed the opinion that the decree left unaffected Papantla's rights under which plaintiff claims. The existence or at least the possible existence of such rights is established or it can be inferred from other portions of the record. These need not be detailed, for the record contains substantial evidence which would support the view that the expropriation decree completely divested Papantla of all of its rights. (E.g., Sarachaga Affidavit, March 6, 1974, Doc. 23; Carrillo-Macor and Ramirez Affidavit, January 31, 1975, Doc. 66; and Carrillo-Macor Affidavit, March 17, 1975, Doc. 69.) It should be noted that all of these affiants, like Gaither, are interested, Sarachaga describing himself as a "representative in New York of the defendant" and Carrillo-Macor and Ramirez describing themselves as "attorneys employed in Mexico City" by the defendant. The affidavit of Sarachaga fails to disclose any qualification which he has to speak on the effect which the expropriation decree had on plaintiff's rights.

It is not the Court's function, however, to weigh the credibility of the various witnesses or to weigh their testimony. At this juncture the evidence adduced by the defendant must be believed.

Plaintiff's motion for summary judgment will be denied.

Wilmington, Delaware

July 16, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 74-17

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Plaintiff,

v.

PETROLEOS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico,

Defendant.

Order.

AND NOW, TO WIT, this 7th day of July, 1975, the cross motions for summary judgment filed in this cause by the respective parties hereto, having come on to be heard on briefs and oral argument before the Court

IT IS ORDERED that each of said motions is hereby denied.

STEEL
J.

Consented to as to form:

WM. H. BENNETHUM
William H. Bennethum
Attorney for Plaintiff

A. G. CONNOLLY, JR.
Arthur G. Connolly, Jr.
Attorney for Defendant

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Civil Action No. 74-17

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Plaintiff,

v.

PETROLEOS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico,

Defendant.

William H. Bennethum, III, Esquire, Wilmington, Delaware, attorney for plaintiff.

Arthur G. Connolly, Jr., Esquire, of Connolly, Bove & Lodge, Wilmington, Delaware, attorney for defendant and Manuel R. Angulo, Esquire and Jose T. Moscoso, Esquire, of Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel.

Opinion.

Wilmington, Delaware

October 7, 1976

STEEL, *Senior Judge:*

The case is before the Court upon a motion of defendant for summary judgment which raises two "act of state" questions: (1) whether the decree of the President of Mexico dated March 18, 1938, which expropriated oil in Mexico owned by foreign nationals, an admitted act of state, had the effect of extinguishing the royalty and participating interests which Papantla Royalties Corporation ("Papantla") claims to have had in the expropriated oil; and (2) whether the actions taken by the Mexican commissions created by presidential decrees of 1945 and 1947 for the purpose of indemnifying persons whose royalty and participating interests in Mexican oil were extinguished, and in particular the refusal of the commissions to recognize certain claims of Papantla, were acts of state of the Mexican government.

Plaintiff is James P. D'Angelo, the receiver of Papantla Royalties Corporation, a dissolved Delaware corporation, appointed by the Delaware Court of Chancery and as such entitled to assert Papantla's claims. The defendant, Petroleos Mexicanos ("Pemex") is a decentralized agency of the Mexican government, which is engaged in all phases of the oil business. Plaintiff seeks an accounting upon the theory that Papantla's royalty and participating interests were not extinguished by the decree of expropriation, but continue to exist with respect to oil produced by Pemex since the expropriation. He also seeks a judgment based upon the failure of Pemex to indemnify Papantla for the destruction of its royalty and participating interests should the Court find that the effect of the expropriation decree was to extinguish them.*

* The complaint prays for an accounting. The evidence and arguments, however, also embrace a claim for indemnification. Both aspects of plaintiff's claim will be considered.

The background of this litigation can be found in *D'Angelo v. Petroleos Mexicanos,* 398 F. Supp. 72 (D. Del. 1975) in which an earlier motion of the defendant for summary judgment was denied. There the Court refrained from deciding whether the expropriation decree had any effect upon Papantla's interests. It noted that the record failed to disclose any "official interpretation" by the Mexican government of the scope of the decree, as had the record in *United States v. Pink,* 315 U. S. 203 (1942) where the question was the scope of a decree of the Soviet government.

Before considering the two substantive act of state questions, a preliminary matter must be disposed of. Plaintiff argues that the present motion should be denied, stating that it is simply a reargument of the act of state doctrine which was the subject of the earlier motion and hence the denial of that motion constitutes the law of the case. Although the record has been expanded significantly since the first motion was decided, plaintiff points out that all of the "new evidence" and the decision in *United States v. Pirk, supra,* upon which defendant new rests its argument were available when it filed its prior motion. This is true. Despite plaintiff's assertion to the contrary, the present motion does not rest upon the same evidence or legal theory as did the first.

The question whether the meaning and effect of the expropriation decree should be resolved by trial as the plaintiff contends or simply by a motion for summary judgment was determined in favor of the latter procedure after the parties had been heard. As a result of a pretrial conference which took place on April 1, 1976 (Doc. 113); the Court entered an order on April 9, which required defendant to serve and file by April 15, 1976, its "proposed" motion for summary judgment and its "proposed" brief and supporting papers (Doc. 112). Defendant complied with this order. With defendant's "new" evidence and

legal theories thus before him, plaintiff was apprised of the defendant's evidentiary and legal position. On May 5, the Court called a further conference for May 25 and wrote plaintiff's attorney as follows:

> "I am notifying you that at the May 25, conference the pending motion of the defendant for summary judgment will be set down for hearing and a schedule fixed for the filing of briefs and supporting and opposing documents unless you satisfy me at the conference that a prima facie basis exists upon which it can be plausibly asserted that the motion for summary judgment should not be fixed for hearing because genuine issues of material fact ostensibly exist." •

At the hearing on May 25, 1976, the Court requested plaintiff to specify the fact issues which he contended would be raised by defendant's motion if it were filed. Plaintiff designated the issues as: (1) whether the Mexican attorney general had the power to give an opinion concerning the scope and effect of the expropriation decree,[•] (2) if he did, whether he exercised the power properly, and (3) whether the record disclosed the existence of an act of state by the Mexican government. (Doc. 118, pp. 6-8).

• While the record does not reveal it, a copy of the letter of May 5, 1976 in the Court's file stated immediately after the portion above quoted:

> "I shall, of course, reserve any definitive determination of the motion, including whether genuine issues of fact exist, until after the motion has been briefed and argued, if indeed I should at the conference of May 25, fix a hearing date on the motion."

[•] The transcript of the May 25, 1976 conference indicates that plaintiff proposed to produce an attorney from Mexico as an expert "who will deny that the Attorney General even has the power to write the letter that he did." (Doc. 118, p. 6). The reference to "the letter" was obviously erroneously but referred to the affidavit of the attorney general. (Exhibit 3 attached to Doc. 115A). This affidavit is the document which the plaintiff had before him at the May 25 conference.

Since it appeared that these would be the only so-called fact issues which the motion might possibly involve, that a trial would require the presence of witnesses from Mexico and a consideration of records and documents located in Mexico, and that substantial testimony in Spanish would be presented at a trial, the Court determined to permit the summary judgment motion to be filed, having in mind that if it were granted a protracted trial would be avoided. It appeared to the Court that a preliminary test of the merit of the act of state defense by motion would be in the interest of an equitable and practical handling of the case and a reasonable exercise of discretion. Considering the foregoing factors and that the record has now been expanded beyond that which was before the Court when the prior motion was heard, the law of the case doctrine is no bar to consideration of the pending motion.

The Effect of the Expropriation Decree Upon Papantla's Royalty and Participating Interests

This is the question left open by the Court's earlier opinion in *D'Angelo v. Petroleos Mexicanos, supra,* p. 78.

In support of its present motion Pemex argues that the effect of the expropriation decree of 1938 • was to ex-

• The expropriation decree of March 18, 1938, reads as follows (Doc. 57, Exhibit E):

> "Decree which expropriates in favor of the Patrimony of the Nation, personal and real properties belonging to the oil companies who refused to accept the decision of the 18th of December of 1937 of group number 7 of the Federal Board of Conciliation and Arbitration.
>
> "There is expropriated by reason of public utility in favor of the Nation; the machinery, installations, buildings,—pipelines, refineries, storage tanks, ways of communication, tank cars, distribution stations, embarcations and all of the other personal property and real property of: Compania Mexicana de Petroleo El Aquila, S.A., Compania Naviera De San Cristobal, Compania Naviera San Ricardo, S.A.; Suasteca Petroleum Company; Mexican Sinclair Petroleum Corporation; Stanford y

tinguish Papantla's royalty and participating interests. On the other hand, plaintiff contends that the expropriation decree, which he concedes to be a valid act of state [•] as this Court held in *D'Angelo v. Petroleos Mexicanos, supra,* at p. 78, is so limited in its terms as not to include Papantla's interests. Plaintiff points out that the decree is expressly limited to seizing the personal and real properties belonging to 17 specified oil companies and nothing more. Plaintiff denies that Papantla owned any of these properties and claims that it only owned royalty and participating interests attributable to the confirmatory concessions, neither of which the decree purported to reach.

In view of plaintiff's position Pemex requested the attorney general of Mexico to render an official interpretation of the scope and effect of the expropriation decree. Acting under authority of Mexican law the attorney general did so. His opinion states in pertinent part (Doc. 115A, Exhibit 3, p. 2-3):

• (Cont'd.)

Company Sucesores, S. en C.; Penn Mex Fuel Company, Sinclair Oil, Pierce Oil Company; Richmond Petroleum Company de Mexico; Compania Petrolera el Agwi, S.A.; Compania de Gas y Combustible Imperio; Consolidated Oil Company of Mexico; Compania Mexicana de Vapores San Antonio, S.A.; Sabalo Transportation Company; Clarita, S.a. y Cacalilao, S.A., in amounts as may be necessary in the opinion of the Secretariat of National Economy for the discovery, production, transportation, storage, refinery and distribution of the petroleum industry."

[•] The traditional formulation of the act of state doctrine is that in *Underhill v. Hernandez,* 168 U. S. 250 (1897):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

See also *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398, 401 (1963).

"[A]ll of the rights of royalty holders [regalistas], that is to say, of surface owners who were entitled, in accordance with contracts with such oil companies, to receive indemnification payments for the occupation of lands; . . . were terminated and extinguished as a result and as a direct consequence of the said Expropriation Decree, by virtue of which all of the properties, movables and immovables, of the 17 petroleum companies mentioned therein were expropriated. Such rights were terminated and extinguished by reason of the legally relevant fact that, as a result of the 1938 Expropriation Decree, the said companies from that date were deprived of the right to exploit or utilize the concessions in any form, and consequently, it was legally impossible for the said companies to perform their obligations with respect to lessors, royalty holders, or third parties, in general, and the assignees thereof."

In *United States v. Pink,* 315 U. S. 203 (1942) the issue was whether expropriation decrees of the Soviet government were intended to have extra-territorial effect with respect to property in New York. That same issue had previously been determined in a companion case, *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.,* 280 N. Y. 286, 20 N. E. 2d 758 (1939), *aff'd* 309 U. S. 624 (1940) by a referee appointed by the lower court to determine, among other things, the intended effect of the Soviet decrees. Based on the record then before him, which did not include an opinion of the Commissariat of Justice of the Soviet government, the referee found that the Soviet decrees were not intended to have extra-territorial effect. Subsequent to the hearings in the *Moscow* case, the plaintiff, being the United States Government in both the *Moscow* and *Pink* cases, requested the Commissariat of Foreign Affairs of the Soviet government to obtain an

official declaration by the Commissariat of Justice in order to make clear, as a matter of Russian law, the effect of the particular expropriation decree. *Pink, supra,* at 218. In response to that request the Commissariat of Justice issued an interpretation on November 28, 1937, which declared that the expropriation decree which had been promulgated in 1918, nearly 20 years earlier, had extra-territorial effect. The Supreme Court, finding this to be an official interpretation of the decree, held that it foreclosed further inquiry by United States courts on the subject. 315 U. S. at 220-21.*

The principle of *Pink* requires this Court to accept the opinion of the attorney general of Mexico as an official declaration by that government that the effect of the expropriation decree was to extinguish Papantla's royalty and participating rights in the expropriated oil.

Plaintiff contends, however, that the attorney general's opinion is irrelevant for the reason that he is not the proper authority to render a conclusive opinion on the meaning and effect of the expropriation decree. This is the prerogative, plaintiff asserts, of the Mexican judiciary which is the only arbiter of property rights in Mexico. Plaintiff bases this statement upon the opinion of the Mexican attorney Sr. Ortega.[*]

* The Court in *Pink* quoted the interpretation of the Commissariat of Justice as follows:

> "The People's Commissariat for Justice of the R. S. F. S. R. certifies that by virtue of the laws of the organs of the Soviet Government all nationalized funds and property of former private enterprises and companies, in particular by virtue of the decree of November 28, 1918 (Collection of Laws of the R. S. F. S. R., 1918, No. 86, Article 904), the funds and property of former insurance companies, constitute the property of the State, irrespective of whether it was situated within the territorial limits of the R. S. F. S. R. or abroad." 315 U. S. at 219-20.

[*] Affidavit of Sr. Ortega dated June 23, 1976, attached as Exhibit A to plaintiff's answering brief to defendant's main brief, etc., Doc. 122.

No inconsistency exists between the opinion of the attorney general and that of Sr. Ortega. The two opinions are satisfactorily reconciled by the Mexican attorney Sr. Carrillo in his affidavit of August 19, 1976 (Doc. 126, Exhibit 3).** Sr. Carrillo agrees with the opinion of Sr. Ortega that in Mexico the arbiter of property rights lies exclusively with the Mexican judiciary. He points out, however, that under Mexican law the judiciary has no power to issue advisory or consultative opinions but can only render decisions when controversies have been submitted to it for resolution. He states that under Mexican law the attorney general is the "juridical counsel of the government",* and that in the absence of an adjudication by a Mexican court of a dispute or controversy, he is not only the proper authority, but the highest and sole authority empowered to issue official legal opinions in response to a proper request. Sr. Carrillo concludes by stating that

** Sr. Carrillo has distinguished credentials. He has been licensed to practice in Mexico for 45 years during which time he has held numerous positions which mark him as a man of credibility in the area in which his opinion is expressed. He has been Professor of Administrative Law as well as the Dean of the Faculty of Law in the National Faculty of Jurisprudence, Director General of a governmental financial institution, Secretary (Minister) of Finance and Public Credit of the Mexican Government, Ambassador to the United States, Secretary (Minister) of Foreign Affairs of Mexico, the author of various books on Mexican law, and the recipient of Honorary Doctor of Law degrees from Harvard University, Southern Methodist University and Lincoln College. He is presently a member of the National College, a public institution of higher education composed of 32 Mexican scholars appointed for life, as well as a lecturer on constitutional and administrative law in the National College and in several universities throughout Mexico.

* Article 2, paragraph V, of the Ley de La Procuraduria provides in relevant part:

> "The Attorney General of the Republic shall have the following powers . . .
>
> V. To issue his opinion as juridical counselor of the Government, when he is so ordered or requested." (Urquia affidavit, Exhibit C, Doc. 115A, Exhibit 6).

the Mexican attorney general acted properly and within the scope of his constitutional and legal authority when he rendered his opinion to Pemex stating that the effect of the expropriation decree was to extinguish Papantla's royalty and participating interests in the expropriated oil.

The opinion of the attorney general stands uncontroverted. His opinion on the effect of the expropriation decree on the rights asserted by plaintiff must be accepted by this Court as an "official declaration" by the Mexican government. As such it precludes this Court from reexamining the question just as the opinion of the Commissariat of Justice did in the *Pink* case. The expropriation decree, so interpreted by the attorney general of Mexico, was an act of state by the Mexican government, and requires this Court to abstain from further inquiry into its scope and effect. In this view of the matter it is not necessary to determine whether the opinion of the attorney general was itself an act of state.

Plaintiff argues that the recent case of *Alfred Dunhill of London, Inc. v. Republic of Cuba*, — U. S. —, 96 S. Ct. 1854 (1976), "abolished" the act of state doctrine and "dealt a death blow" to it. The case warrants no such interpretation. The *Dunhill* case arose out of the confiscation by the Cuban government of the business and assets of five Cuban cigar manufacturers.* The Cuban government appointed "interventors" to replace the old

* This fairly complex litigation involved numerous other issues in addition to the act of state question. The facts set forth in the text are pertinent to an understanding of the defense of act of state relied upon by the Cuban government. A complete statement of all the facts regarding the various claims arising from the Cuban government's confiscation of the cigar industry is unnecessary. A history of the litigation may be found in *Mendez v. Gaber, Coe & Gregg*, 345 F. Supp. 527 (S. D. N. Y. 1972), *Mendez v. Saks and Company*, 485 F. 2d 1355 (2d Cir. 1973) and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, — U. S. —, 96 S. Ct. 1854 (1976); see also *Palicio v. Brush*, 256 F. Supp. 481 (S. D. N. Y. 1966), *aff'd* 375 F. 2d 1011 (2d Cir. 1967), *cert. denied*, 389 U. S. 830 (1967).

ownership and to take possession and operate the businesses. Dunhill was an American importer of Cuban cigars. After intervention Dunhill and two other American importers made payment to the interventors for cigars purchased prior to intervention under the assumption that the interventors were entitled to collect the accounts receivable of the confiscated businesses. The former owners of the confiscated businesses then sued the importers. They claimed that the payments which the importers had made to the interventors were erroneous and that payment was still due them from the importers. The district court sustained the claims of the former owners. As a result of this decision the importers asserted a claim against the interventors and the Cuban government for recovery of their mistaken payments of preintervention accounts.

The interventors defended upon the ground that their refusal to repay the importers was an act of state not subject to question in the United States courts. On appeal by Dunhill to the Supreme Court this contention was rejected. The Court held, in a five to four decision, that the Cuban government had failed to sustain its burden of proving an act of state. The Court affirmed the finding of the district court that "the only evidence of an act of state other than, the act of nonpayment by interventors was a 'statement by counsel for the interventors, during the trial, that the Cuban government and the interventors denied liability and had refused to make repayment.'" The Court held that this statement of counsel "merely restated respondent's original legal position and adds little, if anything, to the proof of an act of state."

In the *Dunhill* case there was no "official declaration" by the Cuban government that the refusal of the interventors to pay Dunhill's claim was authorized by their appointment or by the confiscation decree. The Court considered this important for it said:

"No statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligation. . . ."

The absence of any evidence that the repudiation of Dunhill's claim was deemed to be an official act of the Cuban government, without more, distinguishes *Dunhill* from the instant case. Here Pemex placed in the record the official declaration of the Mexican government expressed through its attorney general that the effect of the expropriation decree was to extinguish Papantla's rights.

Plaintiff places great store upon that part of the *Dunhill* opinion which, speaking through Mr. Justice White, states that an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign government or by one of its commercial instrumentalities.* Plaintiff argues that since Pemex was engaged in a commercial business the act of state doctrine has no relevance to it.

It is true that Pemex is engaged in a commercial business, the operation in Mexico of an oil company for profit. The expropriation, however, was not accomplished as an incident to this business. Pemex was not even in existence when the expropriation occurred. The fact that the Mexican government ultimately entered the oil business through Pemex does not make the expropriation itself commercial activity. It is a classic example of the exercise of a governmental power as an act of the sovereign. For this reason the opinion of Mr. Justice White and the three justices

* Mr. Justice Stevens failed to join in this part of the opinion of the other four justices (Part III) although he was one of the five justices who found that no act of state had been proven by the Cuban government.

Four of the justices, in a minority opinion written by Mr. Justice Marshall, expressed doubt as to the wisdom of applying with inflexibility a "commercial transaction" exception to the act of state doctrine but rather favored a case to case approach.

joining him in *Dunhill*, relating as the opinion does to governmental action in a commercial area, can have no relevance to the present case.

Finally, plaintiff contends that the Payne-Warren Agreement which was entered into at the so-called Bucareli Conferences supercedes and nullifies the effect which the expropriation decree might otherwise have had upon plaintiff's royalty and participating rights. This argument requires a review of the events which preceded the Bucareli Conferences and a discussion of its culminating events.

Prior to the adoption in 1917 of the Mexican Constitution, Article 27, the owners of the surface of land owned the oil in the subsoil. Article 27 changed this by providing that the oil in the subsoil belonged to the Mexican government which was authorized to grant concessions for oil exploitation under conditions not presently important. The effect of the 1917 Constitution was to cancel all concessions granted to foreigners prior to the adoption of the 1917 Constitution. A number of foreign governments, including the United States, protested. As a result the so-called Bucareli Conferences were called and held in Mexico City in 1923. The United States was represented at the conferences by Messrs. Payne and Warren, who had been commissioned by the President.

Plaintiff asserts that at the conclusion of the conferences Messrs. Payne and Warren signed an "Executive Agreement" on behalf of the President—plaintiff refers to it as the "Payne-Warren Agreement"—and that this constituted a "bilateral agreement" or 'international agreement" between the United States and Mexico under which the Mexican government recognized the pre-constitutional rights of the landowners and of foreign nationals derived through them. This so-called agreement, plaintiff asserts, changed the law declared by the 1917 Constitution so that landowners could acquire confirmatory concessions from

the Mexican government entitling them to utilize oil under their land if they could prove to the satisfaction of the government that prior to May 1, 1917, they had intended to do so.

Plaintiff further contends that principles established by the Supreme Court of the United States require that the "Payne-Warren Agreement" be treated as the legal equivalent of a treaty and that the rights acquired by the United States or its nationals under a treaty must be honored regardless of any act of state of the other party to it.

It is not necessary to examine the validity of these legal principles. It is sufficient to point out that the Bucareli Conferences did not result in an agreement of any kind between Mexico and the United States.* At the conferences [*] the Mexican commissioners stated as Point I that it would be "the future policy" of the Mexican government to continue to enforce the principles of the decisions of the Supreme Court of Justice of Mexico in five "amparo" cases. In these decisions the Court had declared that Article 27 of the Constitution of 1917 was not retroactive

* In this Court's prior decision in *D'Angelo v. Petroleos Mexicanos, supra,* the Court stated that as a result of the Bucareli Conferences "agreements were entered into between the Mexican government and certain of the foreign nations, including the United States, represented by Messrs. Payne and Warren." (398 F. Supp. at 74). In making this statement the Court relied upon references in Gaither's testimony to the "Bucareli Agreement", "Warren-Payne Agreement", and the "Bucareli Treaties". See Doc. 56, pp. 20, 78, 112 and Exhibit B attached to plaintiff's earlier reply brief (Doc. 68). This statement of the Court was erroneous as will appear from the text of this opinion. This error, however, does not affect the *D'Angelo v. Petroleos Mexicanos* holding.

[*] Minutes of the conference were taken in English and a transcript thereof appears at p. 82 of the article "The Bucareli Agreements and International Law": by Antonio Gomez Robledo, Professor of International Law, National University of Mexico, published in 1940. Exhibit 1 attached to the reply brief of defendant. (Doc. 126).

and had no effect upon owners of the surface or those entitled to exercise their rights to explore for oil or take some related action, if, prior to 1917, they had performed "some positive" act which had manifested an intention to exercise such rights.** The commissioners stated further that the Mexican government would grant permits to such persons to drill upon their lands under certain limitations not presently relevant. In Point III the Mexican commissioners referred to the rights of this limited group of persons as "preferential rights". In this litigation the rights have been referred to as "confirmatory concessions."

As to the policy of the Mexican government to grant the "preferential rights" in the future the Mexican commissioners stated in Point IV that:

> "the policy of the present Executive is not intended to constitute an obligation for an unlimited time on the part of the Mexican Government . . ."

In Point V the United States commissioners stated that the United States reserved the rights of its citizens under international law and equity to the subsoil of the lands owned by them prior to the promulgation of the Constitution of 1917. The Mexican commissioners stated that they recognized the rights of the United States to make the reservation.

** These "positive acts" were described as:

"drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil and in cases where from the contract relative to the subsoil it appears that grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described." *Robledo* article, *supra,* p. 83.

Commenting upon the "juridical value" to be attributed to the statements by the Mexican commmissioners, Professor Robledo in the article entitled "The Bucareli Agreements and International Law" * said at p. 87:

> ". . . [t]hey do not commit the Mexican state to the same extent the treaties do, that is, with a strict bond of law."

Continuing, he said at p. 89:

> "[T]he statements under discussion do not constitute a treaty—inasmuch as the commissioners had no plenipotentiary power to reduce them to that solemn form, and as the statements themselves received no ratification from the Senate or the approval of the President and their subsequent promulgation,—they are not and have never been a law for the state. They merely enunciate the conduct that the government in behalf of which they were made meant to follow; hence they can be amended or repudiated by later governments."

The United States Department of State likewise reviewed the transcript of the minutes of the Bucareli Conferences which Professor Robledo had discussed, and it concluded (Doc. 126, Exhibit 2):

> "Thus, the said document is not a treaty or Executive agreement of the United States."

See also letter dated September 13, 1976, from the State Department to plaintiff's attorney attached to affidavit of Andrew Ross (Doc. 127).

Plaintiff's contention that an agreement or treaty between the United States and Mexico was entered into at

* Exhibit 1 attached to reply brief of defendant (Doc. 126).

the Bucareli Conferences is negated by all the material evidence in the record. What the Mexican commissioners said at the conferences amounted to nothing more than a declaration of policy of the existing government which was subject to amendment or revocation by the government at any time in the future.

Under the uncontradicted material evidence plaintiff's claim must fail insofar as plaintiff seeks an accounting from Pemex for oil produced by it, based as the claim is on the theory that Papantla's royalty and participating rights which pre-dated the expropriation decree were not extinguished as a result of it. Evidence of record and plaintiff's argument, however, presents plaintiff's claim upon an alternative theory, i.e., that if Papantla's royalty and participating rights were extinguished by the decree, Pemex was obligated by Mexican law to compensate Papantla for their value which it has failed to do. It is this aspect of plaintiff's claim that is next considered.

Whether the Failure of the Mexican Commissions to Indemnify Papantla for its Royalty and Participating Interests Extinguished as a Result of the 1938 Presidential Decree Was an Act of State.

The Mexican government recognized that the expropriation decree would cause loss to some lessors and holders of royalty and participating interests such as Papantla by its effect in extinguishing their rights. It therefore sought an equitable method by which those persons who were damaged could be compensated.

In 1945 the President of Mexico, as an exercise of his constitutional powers, issued a presidential decree delegating to Pemex primary responsibility for vertifying the claims for rent and royalties and determining who were

entitled to be compensated because of their loss. Thereafter Pemex assigned its duties under the decree to the Comision de Rentas e Regalias ("Comision de Regalias") which Pemex created for that purpose. The Comision de Regalias was staffed by lawyers who had been carrying out studies requested by the Director General of Pemex since 1944 concerning the problem of rent and royalty claimants. By the same 1945 decree the President established a governmental commission, Comision Depuradora e Liquidora de Rentas e Regalias del Petroleo ("Comision Depuradora"), composed of one official from the Ministry of Finance and Public Credit, one official from the Ministry of National Economy and two officials from Pemex. It had the responsibility for resolving and finalizing claims which it found to be meritorious after it had received satisfactory information as to the verification of the claims.

In 1947 a further presidential decree declared that:

> "For obvious reasons of justice and for the convenience of the national economy, it is necessary to proceed to resolve the claims which are pending resulting from obligations directly linked to the indemnification for expropriation derived from the application of the Decree of March 18, 1938, with claimants of rents and royalties agreed upon by the expropriated companies. . . ."

The 1947 decree changed the name of Comision de Regalias to Comision Revisora de Rentas y Regalias ("Comision Revisora"), terminated the Comision Depuradora, and transferred the functions of the latter to Pemex which was to proceed as soon as possible with the verification and finalization of the rent and royalty claims such as those asserted by Papantla. Pursuant to the 1947 decree Pemex established in February 1948, the Comision de Regalias, Rentas e Indemnizaciones Globales ("Comision Global"). The duties and responsibilities for the execution of the national policies manifested in the presidential decrees of 1945 and 1947 were consolidated in the Comision Global. The authority of the commissions to provide indemnification for legitimate claims was recognized by Roscoe B. Gaither * on behalf of Papantla, who submitted its claims to the commissions for determination and accepted payment for those claims which the commissions deemed meritorious.

Pemex contends that the commissions were acting under presidential decrees and hence their activities, and in particular their failure to recognize and pay most of plaintiff's claims, were acts of state of the Mexican government, which, under relevant principles, require this Court to abstain from looking into the validity of the claims or reviewing the proceedings before the commissions.

That the actions of the commissions were acts of state is substantiated by the opinion of the attorney general of Mexico. In his affidavit of March 22, 1976, he said (pp. 6-8 of Exhibit 3, Doc. 115A):

> "The Decrees of the President of the United Mexican States, in the legitimate exercise of his constitutional powers, in creating the *Comision Depuradora y Liquidadora de Rentas y Regalias del Petroleo* and the [creation of the] *Comision de Regalias, Rentas e Indemnizaciones Globales* by Petroleos Mexicanos, for the purpose of complying with the duties and obligations imposed thereon by the aforementioned Presidential Decrees, and its [Petroleos Mexicanos] activity as an instrumentality or agent of the Government for such purpose; and the determina-

* Gaither was the "father" of Papantla and until his death in 1974 represented it in all important matters.

tion of the legitimacy, evaluation, and the consequent acceptance or rejection of the aforementioned claims by the said Commissions, were all, severally or collectively, acts of the Mexican Government performed by it and through its authorized agents, in the exercise of its governmental and sovereign powers; . . . .

The procedure for indemnification established by the oft-cited Presidential Decrees of 1945 and 1947 neither contemplates nor recognizes, in any manner whatsoever, an award for damages by a foreign Court or Tribunal; since the procedure established by the said Decrees provides the sole and exclusive means to obtain the recognition of a right to damages suffered by lessors, royalty holders, third parties, and the assignees thereof, as a result of the oil Expropriation Decree in 1938."

As previously pointed out, the Mexican attorney general is the highest and sole authority empowered to issue official legal opinions when properly requested to do so. His opinion that the actions of the commissions were sovereign governmental actions is an "official declaration" of the Mexican government and under *Pink* must be conclusively accepted by this Court. That opinion compels the conclusion that the actions of the commissions were acts of state.

Plaintiff asserts that this conclusion is inconsistent with the holding in *Dunhill*. He points out that in *Dunhill* the Court rejected the Cuban government's argument that the refusal of the "interventors" to pay Dunhill was an act of state, and that the Supreme Court noted that no formal evidence was before it of the repudiation by the Cuban government of her obligations.

This, according to plaintiff, becomes significant in the light of the statement of Mrs. Gaither, the wife and executor of the estate of Gaither. She said that she examined her husband's personal files, the files of Papantla in her possession and the files of Pemex and that none contain any *written rejection* of Papantla's claims. From this plaintiff argues that in the absence of any formal rejection of Papantla's claims by the Mexican commissions their action, under *Dunhill*, cannot be viewed as an act of state.

Plaintiff misreads *Dunhill*. Four of the justices who joined in the dissenting opinion, writing through Mr. Justice Marshall, said:

> "I do not understand the Court to suggest, however, that the act of state doctrine can be triggered only by a 'statute, decree, order or resolution' of a foreign government, or that the presence of an act of state can only be demonstrated by some affirmative action by the foreign sovereign. While it is true that an act of state generally takes the form of an executive or legislative step formalized in a decree or measure, see, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 403-405, n. 7 (1964); *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (SDNY 1939), that is only because duly constituted governments generally act through formal means. When they do not, their acts are no less the acts of a State, and the doctrine being a practical one, is no less applicable."

Non-action as well as affirmative conduct of a governmental agency, if based upon sovereign governmental authority, can have the status of an act of state. *French v. Banco Nacional*, 23 N. Y. 2d 46, 242 N. E. 2d 704 (1968). Conduct otherwise having the quality of an act of state does not lose its character as such simply because it is not evidenced by a formal governmental decree. *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918), *Underhill v.*

Hernandez, 168 U. S. 250 (1897). The minority opinion in *Dunhill* recognizes this:

> "That a foreign sovereign has issued no formal decree and performed no 'affirmative' act is not fatal, then, to the act of state claim. If the foreign state has exercised a sovereign power either to act or to refrain from acting, there is an act of state."

The situation in *Dunhill* contrasts sharply with the instant one. The *only* evidence of an act of state in *Dunhill* was the non-payment by the interventors of Dunhill's claims and the denial of liability by the Cuban attorneys. In the present case an act of state is evident in the record. The presidential decrees created the commissions for the specific purpose of determining the claimants entitled to indemnification and to provide for it. It was the functioning of the commissions within this area of their specific presidential authorization which resulted in their rejection of and failure to pay Papantla's claims. Mrs. Gaither does not say that the commissions did not examine the claims or that the Comision Global did not reject them. The record is undisputed that the commissions did both.*

Viewed in the light most favorable to plaintiff the record discloses that Gaither filed 576 claims on behalf of Papantla for indemnification with the Mexican commissions, that 7 of the claims were recognized and paid, and that the remainder were rejected. The failure of the commissions' records to contain written evidence of their rejections of the claims or their failure to give Gaither or Papantla written notice of their rejection may not comport with procedures and practices generally followed by administrative agencies of the United States. It does not follow that for this reason this Court should exercise its

* Acosta affidavit dated March 9, 1976 (Doc. 115B, Exhibit 5).

jurisdiction to adjudicate the claims and decide whether the Mexican government through its agent Pemex must pay them. Because the actions and nonactions of the Mexican commissions were acts of state this Court will not review them and attempt to correct errors, if any there were, in their procedures and decisions. It would be inappropriate and probably offensive or an affront to the Mexican government for it to do so. In fact, the Mexican government through its embassy in Washington has submitted a diplomatic note to the State Department which in effect asks the State Department to request this Court to abstain from continuing with the present action.*

If plaintiff seeks to obtain redress from the actions of the commissions he must resort to whatever channels, if any there are, available to him in Mexico. The fact that there may be none does not justify this Court exercising its jurisdiction in the matter.

The motion of the defendant for summary judgment will be granted.

* Affidavit of Sr. Flores, Minister Counselor of the Embassy of the United Mexican States dated April 12, 1976, (Doc. 1115A, Exhibit 4).

This note was filed to request the United States to grant sovereign immunity to the government of Mexico in the present suit. The record fails to show that this request was acted upon one way or the other by the State Department. Defendant, in its motion for summary judgment, has reserved the right to plead sovereign immunity if the State Department should act favorably upon the request of the Mexican government.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION FILE No. 74-17.

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation

v.

PETROLEOS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico

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Judgment

This action came on for hearing before the Court, Honorable Edwin D. Steel, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of the defendant for summary judgment will be granted in accordance with the Opinion issued October 7, 1976 and the plaintiff's motion for reargument will be denied in accordance with the Opinion issued November 4, 1976.

Dated at Wilmington, Delaware, this 17th day of November, 1976.

EVAN L. BARNEY,
Clerk of Court.

By /s/ WM. S. ANDERSON, JR.
Ch. Dep. Clerk.

APPENDIX C.

[Letterhead of]

DEPARTMENT OF STATE

Washington, D.C. 20520

January 31, 1974

Mr. James P. D'Angelo
Law Offices
1300 King Street
P.O. Box 1126
Wilmington, Delaware 19899

Re: *James P. A'Angelo, Receiver for Papantla Royalties Corporation v. Petroleos Mexicanos, C.A. 4165 Court of Chancery,* Wilmington, Delaware

Dear Mr. D'Angelo:

This is in response to your letters of July 19, 1973, and November 14, 1973, requesting that the Department of State address a letter to the court in the above-mentioned case commenting upon the applicability of the Act of State Doctrine in that case. You advised us on December 26 that the court had entered a final order, which has been stayed pending appeal.

I am aware that there has been additional correspondence regarding this matter between yourself and Mr. David A. Gantz of this office, and that in September you met with Mr. Gantz to discuss all of the relevant issues. Under these circumstances I believe you have been given a reasonable opportunity to present your views to the Department.

As Mr. Gantz indicated to you when he met with you and Mr. William Bennethum on September 11, except in

sovereign immunity matters the Department does not normally become involved in law suits before the courts. While there have been some exceptions to this general rule under special circumstances such as those present in the case of *First National City Bank v. Banco Nacional de Cuba*, we do not believe the foreign relation interests of the United States warrant such action by the Department in this particular matter. Accordingly, I must decline to comply with your request. In doing so, I wish to emphasize that the Department of State takes no position whatsoever on the merits of the case or the interpretation given by the court or counsel to the Act of State Doctrine.

Sincerely,

/s/ CARLYLE E. MAW
Carlyle E. Maw
The Legal Adviser

cc:
Arthur Connolly, Esquire